



**Before The
State Of Wisconsin
DIVISION OF HEARINGS AND APPEALS**

Application of Sharon Hackel for a Permit to
Replace Existing Riprap with a New Seawall
Construction on Shawano Lake, Village of Cecil,
Shawano County, Wisconsin

Case No.: 3-NE-01-0641

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Sharon Hackel, N7973 Pigeon Road, Sherwood, Wisconsin, 54169, applied to the Department of Natural Resources for a permit to construct a seawall along the Shawano Lake, Town of Sherwood, the NW ¼, SE ¼, Section 17, T27N, R17E, Shawano County.

On November 13, 2001, the Department of Natural Resources denied the permit application. By letter dated January 7, 2002, the Department of Natural Resources granted Sharon Hackel's request for a hearing pursuant to Wis. Stat. § 227.42. The Division of Hearings and Appeals received a Request for Hearing from the Department on September 4, 2002.

Pursuant to due notice hearing was held on November 6, 2002 at Shawano, Wisconsin, Jeffrey D. Boldt, administrative law judge (the ALJ), presiding.

In accordance with Wis. Stat. §§ 227.47 and 227.53(1)(c), the PARTIES to this proceeding are certified as follows:

Scott Hackel and Sharon Hackel, by

Attorney Steve Frassetto
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Wisconsin Department of Natural Resources, by

Attorney Edwina Kavanaugh
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FINDINGS OF FACT

1. Scott and Sharon Hackel, N7973 Pigeon Road, Sherwood, Wisconsin, 54169, completed filing an application with the Department of Natural Resources for a permit under Wis. Stat. § 30.12, to construct a seawall on the bed of Shawano Lake, Town of Sherwood, Shawano County. The Department and the applicants have fulfilled all procedural requirements of Wis. Stat. §§ 30.12 and 30.02.

2. The applicants own real property located in the NW ¼, SE ¼ in Section 17, Township 27 North, Range 17 East, Village of Cecil, Shawano County. The above-described property abuts Shawano Lake, which is navigable in fact at the project site.

3. The applicants propose to construct a new concrete retaining wall to be connected into a neighbor's similar structure. The wall would be 75 feet long, and would include a four-foot wide sidewalk, and an eight-foot face. The wall would be constructed with ½ inch rebar every 18 inches. They would also place a plywood cofferdam including soils from the lake to keep water out.

4. The purpose of the project is ostensibly to prevent erosion, but also to make the raking of lake vegetation easier. A large amount of dead weeds and other vegetative detritus washes into the proposed project area in the summer. In the summertime the prevailing southerly and south westerly winds blow this material to the northeast corner of the lake, including the Hackel property. The applicants have established, by the testimony of their neighbors, that it is much easier to rake out this vegetation over a retaining wall rather than over the existing riprap.

5. The applicants have not demonstrated "any erosion of the bank and adjacent land" which is an essential element of a permit for a retaining wall. There was no observable evidence of erosion at the site. Further, the site was rated by the Department's objective criterion as having "a low to moderate" potential for erosion based upon site and wind characteristics. (Koehnke, Cunningham) The applicants have not carried their burden of proof in showing that there is erosion sufficient to require the retaining wall. The existing riprap, while requiring maintenance, is sufficient to protect the shoreline from erosion.

6. The proposed structure will not materially obstruct existing navigation on Lake Shawano.

7. The proposed seawall will have a detrimental impact on habitat for fish species. Nearshore aquatic vegetation will be reduced or eliminated by scouring from the reflected wave energy. This vegetation provides spawning and nursery habitat for northern pike, muskellunge, panfish, forage minnows and bass, all fish species present in Shawano Lake. (Langhurst) The nearshore area also provides habitat for 2 species of fish that are of special concern: *Notropis texannus* (weed shiner) and *Fundulus diaphanus* (banded killifish). Special concern species are species for which the Department suspects, but has not yet proved, a problem in abundance or distribution. (Langhurst, Koehnke) The weed shiner inhabits lakes, sloughs, and quiet sections of rivers. It is extremely sensitive to environmental deterioration. The banded killifish inhabits

the shallow areas of large lakes and quiet backwaters, and strongly prefers a habitat of broad, sandy shallows in the vicinity of vegetation during the warm season of the year. Spawning and egg laying occurs in both floating and submergent vegetation in shallow water. (Langhurst) The applicants have not established that there will be no likely detrimental impacts to the public interest in maintaining fish habitat including for “threatened” species.

8. The loss of near shore vegetation reduces the quantity and quality of the wildlife habitat, both at the site and cumulatively for Shawano Lake. Affected wildlife would include migratory birds (neotropical and waterfowl), shore birds, reptiles, furbearers, invertebrates, amphibians and reptiles. Emergent aquatic vegetation serves as cover and food for waterfowl and other waterbirds, while the invertebrates and insects (caddisfly, dragonfly, damselfly nymphs) that colonize aquatic vegetation also serve as food for waterfowl. (Koehnke, Brockman-Mederas)

9. The proposed seawall would have negative cumulative impacts on near shore littoral zone habitat. Hard armored structures like seawalls reflect wave energy back into the lake from the seawall rather than dissipating the energy like riprap or natural shorelines. The reflected wave energy scours the lakebed in front of the seawall and decreases the ability of aquatic vegetation to set roots or remain rooted. By eliminating vegetation in the area, the scouring causes the area to become bare sand. The loss of aquatic vegetation in the area prevents invertebrates and insects that colonize aquatic vegetation from establishing or remaining there. (Koehnke, Cunningham, Langhurst)

10. The scientific understanding of the detrimental direct and cumulative impacts of placing concrete retaining walls along lakefronts has evolved since many similar structures were placed on Shawano Lake. (See: Exs. 11-12) Areas with concrete retaining walls were found to have the most significant detrimental impacts upon habitat and fish species richness when compared with either natural shorelines or riprapped areas. This 1999 study concluded as follows: “when erosion control is a necessity, riprap appears to provide beneficial fish habitat compared with retaining walls.” (Ex. 12, p. 24)

11. The applicants are financially capable of constructing, maintaining, monitoring or removing the structure if it should be found in the public interest to do so.

12. The proposed structure will not reduce the effective flood flow capacity of Lake Shawano upon compliance with the conditions in the permit.

13. The proposed structure will not adversely affect water quality nor will it increase water pollution in Lake Shawano. The structure will not cause environmental pollution as defined in Wis. Stat. § 281.01(10), if the structure is built and maintained in accordance with this permit.

14. The Department of Natural Resources has complied with the procedural requirements of Wis. Stat. § 1.11, and Wis. Admin. Code ch. NR 150, regarding assessment of environmental impact.

DISCUSSION

The applicants bought their beautiful lakefront home without being aware of the vegetation debris that floats to their area of the lake in the summer. Scott Hackel told of the entire family spending 8 to 12 hour days raking up these smelly weeds over the existing riprap. This is an unfortunate situation and there are no easy answers for the Hackels in how to better control the weed-debris problem. However, putting up a concrete retaining wall across the property to ease removal of the weeds is not an acceptable solution under Wisconsin law. Retaining walls are permissible only where there is “erosion of the bank or adjacent lands”. The applicants have not shown any measurable problem with erosion. Placement of just a few larger pieces of riprap would prevent any loss of adjacent land subject to erosion. This would be much less detrimental to beneficial aquatic vegetation and the habitat values of the lake. The DNR presented un rebutted expert testimony which demonstrated that placement of the retaining wall would likely have a detrimental impact, both directly and cumulatively.

It is hoped that some other less environmentally detrimental remedy, perhaps the type of pulley system suggested by the DNR, can be found to address the problem of the pile-up of weed debris in the area.

CONCLUSIONS OF LAW

1. The Division of Hearings and Appeals has authority under Wis. Stat. §§ 30.12 and 227.43(1)(b), in accordance with the foregoing Findings of Fact, to issue a permit for the construction and maintenance of said structure subject to the conditions specified.
2. The applicants are riparian owners within the meaning of Wis. Stat. § 30.12.
3. The proposed retaining wall described in the Findings of Fact constitutes a structure within the meaning of Wis. Stat. § 30.12.
4. A permit to place material on the bed and bank of navigable waters adjacent to a riparian owner’s property for the purpose of protecting the bank and adjacent land from erosion may be issued pursuant to Wis. Stat. §§ 30.12(3) if issuance is not detrimental to the public interest in the water involved.
5. The applicant has the burden of proof in an application for a permit under Wis. Stat. ch. 30. *Village of Menomonee Falls v. DNR*, 140 Wis. 2d 579, 412 N.W.2d (Wis. Ct. Apt. 1987) The applicants have not carried their burden of proof in demonstrating that the retaining wall is needed to prevent erosion and that it would not be detrimental to the public interest in Shawano Lake.
6. The project is a type IV action under Wis. Admin. Code § NR 150.03(8)(f)4. Type IV actions do not require the preparation of a formal environmental impact assessment.

ORDER

WHEREFORE IT IS HEREBY ORDERED, that the permit application be denied.

Dated at Madison, Wisconsin on December 6, 2002.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
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By: _____
JEFFREY D. BOLDT
ADMINISTRATIVE LAW JUDGE

NOTICE

Set out below is a list of alternative methods available to persons who may desire to obtain review of the attached decision of the Administrative Law Judge. This notice is provided to insure compliance with Wis. Stat. § 227.48, and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any party to this proceeding adversely affected by the decision attached hereto has the right within twenty (20) days after entry of the decision, to petition the secretary of the Department of Natural Resources for review of the decision as provided by Wisconsin Administrative Code NR 2.20. A petition for review under this section is not a prerequisite for judicial review under Wis. Stat. §§ 227.52 and 227.53.
2. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Department of Natural Resources a written petition for rehearing pursuant to Wis. Stat. § 227.49. Rehearing may only be granted for those reasons set out in Wis. Stat. § 227.49(3). A petition under this section is not a prerequisite for judicial review under Wis. Stat. §§ 227.52 and 227.53.
3. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefor in accordance with the provisions of Wis. Stat. §§ 227.52 and 227.53. Said petition must be filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (2) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Since the decision of the Administrative Law Judge in the attached order is by law a decision of the Department of Natural Resources, any petition for judicial review shall name the Department of Natural Resources as the respondent. Persons desiring to file for judicial review are advised to closely examine all provisions of Wis. Stat. §§ 227.52 and 227.53, to insure strict compliance with all its requirements.

